UNIVERSITI UTARA MALAYSIA

v.

MUTIARA MOHAMAD & ORS AND ANOTHER CASE

HIGH COURT MALAYA, ALOR SETAR
SEE MEE CHUN JC
[CIVIL SUITS NO: 22-349-2007 & 22-350-2007]
20 FEBRUARY 2011

CONTRACT: *Breach - Damages - Claim for - Agreement sponsoring first defendant ('D1') for PhD programme - Terms of - Failure of D1 to sign letter of undertaking and report for work - Whether D1 breached terms of agreement - Disciplinary proceedings leading to dismissal of D1 carried pursuant to Statutory Bodies (Discipline and Surcharge) Act 2000 - Whether plaintiff governed by Universities and University Colleges Act 1971 - Whether dismissal valid - Whether plaintiff is a statutory body or body corporate - Factors to consider - Whether plaintiff's claim allowed*

UNIVERSITY: *Sponsorship agreement - Requirement to serve university upon return - Failure of first defendant ('D1') to sign letter of undertaking and report for work upon completion of studies - Whether D1 breached terms of agreement - Disciplinary proceedings leading to dismissal of D1 carried pursuant to Statutory Bodies (Discipline and Surcharge) Act 2000 - Whether plaintiff governed by Universities and University Colleges Act 1971 - Whether dismissal valid - Whether plaintiff is a statutory body or body corporate - Factors to consider - Whether plaintiff's claim allowed*

The plaintiff ('UUM') had entered into an agreement dated 22 August 1997 ('the agreement') with the defendants. Pursuant to the agreement, UUM was to sponsor the first defendant ('D1'), a lecturer, in a PhD programme whilst the second and third defendants were the guarantors. Further, the agreement required D1 to return to Malaysia immediately upon completion of her studies to serve UUM. In 2002, D1 was asked to sign a letter of undertaking ("Aku Janji") and *vide* letter dated 31 October 2003, *ie*, upon completion of her studies in May 2003, D1 was instructed to report for work immediately since her leave had ended on 1 June 2003. Due to D1's failure to sign the "Aku Janji" and report for work, UUM further issued a letter to show cause as to why disciplinary action with a view to dismissal or reduction in rank should not be taken against her. Pursuant to the

A Statutory Bodies (Discipline and Surcharge) Act 2000 ('Act 605'), disciplinary proceedings were conducted against D1 and the disciplinary committee dismissed D1 with effect from 8 December 2004. D1 appealed against the said decision but her appeal was dismissed wherein the appeal committee affirmed the disciplinary B committee's decision. UUM filed this suit seeking for relief of damages which arose from violation of conditions and breach of the agreement. On the other hand, D1 counterclaimed for, *inter alia*, a declaration that her dismissal was null and void. D1 contended that UUM was not a statutory body but a body C corporate and thus, it was governed by the Universities and University Colleges Act 1971 ('Act 30') in so far as disciplinary matters were concerned. On the contrary, UUM submitted that Act 605 applied to it by virtue of it being a statutory body and it had not been excluded from the application of that law. Hence, D in order to decide whether UUM's claim for breach of contract could be sustained, the issue that arose herein for determination was whether the dismissal of D1 was valid.

Held (allowing the plaintiff's claim; dismissing D1's counter-
E **claim):**

(1) A statutory body referred to the manner in which the body was created, *ie*, by statute, whereas a body corporate referred to what had been created, *ie*, the University. It would fall within the meaning of "statutory body" in Act 605 F which is defined as "a body, by whatever name called, incorporated by federal law for the purposes of the Federal Government". In the case of UUM, it was the coming together of the chancellor, vice chancellor and members of the board and senate which constituted the body corporate G with the powers as given by law. Thus, it did not mean that it could not also be a statutory body within the meaning of Act 605. Further, UUM had been created by a federal law in the form of Act 30, thus making it a statutory body. As such, UUM's disciplinary proceedings against D1 pursuant to H Act 605 were in order. (paras 12 & 15)

(2) There had been procedural impropriety by the disciplinary committee wherein the vice chancellor had failed to: (i) explain the contents of the "Aku Janji" as required by para. I 9 of "Pekeliling Perkhidmatan Bilangan 17 Tahun 2001-

Penguatkuasaan Surat Aku Janji Untuk Pegawai Awam" and (ii) to declare his interest in the disciplinary proceedings as required under reg. 4(1) of the Statutory Bodies (Discipline and Surcharge) Regulations. (para 17)

(2a) From 1 June 2003 to 31 October 2003 and then through to 5 September 2004, D1 had been absent without leave and prior permission. This constituted absence without leave which rendered D1 liable to disciplinary action and the consequences that entailed. (para 19)

(3) The procedural impropriety was in respect of the charge on "Aku Janji" and not in relation to the absence without leave. As the disciplinary proceedings were conducted in accordance with the relevant law, *ie*, Act 605, the dismissal of D1 on the charge of absence without leave could still stand. (para 21)

(4) D1 had disregarded the terms of the agreement in not returning to serve UUM from May 2003 till October 2003 and through September 2004. In doing so, D1 had breached the agreement. (para 22)

Case(s) referred to:
Fadzil Mohamed Noor v. Universiti Teknologi Malaysia [1981] CLJ 85; [1981] CLJ (Rep) 53 FC ***(refd)***

Legislation referred to:
Statutory Bodies (Discipline and Surcharge) Act 2000, ss. 2(1), 5, 6, 7, 28, 29
Universities and University Colleges Act 1971, ss. 6, 7, 16A, 16C

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, 2006 Reissue, vol 9(2), paras 1101, 1113, pp 635, 643

For the plaintiff - Bahador Omar; M/s Bahador Omar & Co
For the defendant - Mohamed Hanipa Maidin; M/s Mohamed Hanipa & Assocs

Reported by Kumitha Abdul Majid

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JUDGMENT

See Mee Chun JC:

[1] Universiti Utara Malaysia (UUM) as plaintiff seeks the relief of damages arising from breach of conditions and contract Perjanjian Belajar Di Bawah Skim Latihan Kakitangan Akademik Dan Pentadbiran Agreement). The agreement dated 22 August 1997 was entered into between UUM and the defendants. Pursuant to the agreement, UUM was to sponsor first defendant (D1) a lecturer in a PhD programme and second (D2) and third defendants (D3) were the guarantors. D2 and D3 have since passed away.

[2] On 2 September 1997 D1 was granted study leave for a period of 36 months ending on 1 September 2001 and subsequently extended to 1 August 2002. In 2002 she was asked to sign a Letter of Undertaking (Aku Janji). *Vide* letter dated 31 October 2003 (P6) she was instructed to report for work dengan Kadar Segera which letter stated her leave had ended on 1 June 2003.

[3] By letter dated 17 March 2004 D1 was issued a letter to show cause as to why disciplinary action with a view to dismissal or reduction in rank should not be taken against her. This was on account of her failure to sign the Aku Janji and report for work. She sent two letters dated 5 September 2004 for extension of her no pay leave until September 2006 and clarification on Aku Janji. Disciplinary proceedings proceeded and the Disciplinary Committee of the Management and Professional Group (No.1) (Disciplinary Committee) in its meeting of 7 December 2004 dismissed her with effect from 8 December 2004 and she was informed by letter dated 23 December 2004. D1 appealed by letter dated 1 January 2005. The appeal was dismissed and the decision of the Disciplinary Committee was affirmed by the Appeal Committee in its meeting of 6 October 2005 and notified to D1 by letter dated 12 October 2005.

[4] D1 counterclaims for a declaration that the dismissal is null and void and of no effect and seeks damages in terms of salary and allowances.

Basis Of UUM's Claim

[5] D1 has submitted UUM's claim is not based purely on breach of contract as it had pleaded in para. 11 of the statement of claim the Disciplinary Committee had legally and validly dismissed D1. I would say that by referring to para. 18(a) of the statement of claim the main relief sought by UUM is damages arising from violation of conditions and breach of agreement. Hence the basis of its claim is premised on a breach of contract. However if D1 had not been validly dismissed, UUM's claim for breach of contract would not be sustained. The first issue therefore becomes that of whether the dismissal of D1 was valid.

Under Which Act Should The Disciplinary Proceedings Be Conducted

[6] It is not disputed that the disciplinary proceedings leading to D1's dismissal was carried out pursuant to Statutory Bodies (Discipline and Surcharge) Act 2000 [Act 605]. UUM contends Act 605 applies to it by virtue of it being a statutory body and it has not been excluded from the application of that law. D1 contends otherwise and says UUM is not a statutory body but a body corporate and UUM at that time was governed by Universities and University Colleges Act 1971 [Act 30] in so far as disciplinary matters were concerned.

Act 605

[7] Act 605 came into force on 1 November 2000 *vide* PU (B) 361/2000. It is a law to provide for matters relating to the discipline of, and the imposition of surcharge on, officers of statutory bodies incorporated by federal law. Section 2(1) states it shall apply to all statutory bodies except those listed in the first schedule. UUM is not listed in the first schedule. A statutory body is defined as "means a body, by whatever name called, incorporated by federal law for the purposes of the Federal Government, but does not include a local authority". Section 5 then provides the regulations (defined to be those in the second schedule) shall apply in respect of the discipline of officers of a statutory body. Section 6 provides the disciplinary authorities for the various categories of officers shall be the Disciplinary Committees established in accordance with part I of the third schedule. As provided in s. 7 the appropriate Disciplinary Appeal Committee is as per part II of the third schedule.

A **Act 30**

[8] Act 30 provides for the establishment, maintenance and administration of Universities and University Colleges. UUM was incorporated and established pursuant to an incorporation order
B under s. 6. Act 30 provides such higher educational institution so established to be a body corporate. Section 7 provides the effect of such incorporation order is that such higher educational institution, the Chancellor, the Vice Chancellor and members of the Board and Senate shall be deemed to have been constituted
C a body corporate. Section 16A grants to the Board of Directors of the University disciplinary authority over all its staff, officers and employees and enables the establishment of Disciplinary Committees. Section 16C is the power of the board to make disciplinary rules. Sections 16A and 16C were subsequently
D deleted with effect from 1 February 2009 (PU B 40/2009).

[9] It will thus be clear that the disciplinary authority established under Act 605 and Act 30 is different. D1 contends that UUM is a body corporate and not a statutory body such that Act 605
E does not apply and therefore the disciplinary proceedings pursuant to Act 605 cannot stand. It is also suggested that even if Act 605 applies it could only have applied upon the deletion of s. 16A from Act 30 with effect from 1 February 2009. As the disciplinary proceedings commenced in 2004 they are not valid.

F **[10]** As provided by Act 30, UUM is a body corporate. Essentially a body corporate is a distinct entity with a legal personality separate from the members constituting it. As envisaged by s. 7 of Act 30, the Chancellor, the Vice Chancellor and members of the Board and Senate shall be deemed to have been
G constituted a body corporate. This means that together these individuals are recognized as a body corporate. The intention is as spelled out in s. 7 itself which is to have perpetual succession; to sue and be sued in its own name; to purchase any immovable and movable property; to sell, lease, exchange or otherwise dispose of
H any such property and to exercise, discharge and perform all such powers, duties and functions as may be conferred or imposed.

[11] *Halsbury's Laws of England* 4th edn. 2006 Reissue vol. 9(2) at para. 1101 p. 635 explains thus:

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> A corporation may be defined as a body of persons ... or an office ... which is recognized by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder for the time being of the office in question,

and at para. 1113 p. 643:

> The nature of a corporation may be shown by contrasting it, as legal conception, with the individuals or mass of individuals in which it resides. In law the individual incorporators, or members, of which it is composed are something wholly different from the corporation itself, for a corporation is a legal person just as much as an individual.

[12] A body corporate is thus a body of persons endowed with a legal personality. In the case of UUM it is the coming together of the Chancellor, the Vice Chancellor and members of the Board and Senate to constitute the body corporate with the powers as given by law. This does not however mean it cannot also be a statutory body within the meaning of Act 605. In essence a statutory body refers to the manner in which the body is created, ie by statute, whereas a body corporate refers to what has been created ie the University. It would fall within the meaning of "statutory body" in Act 605 which is defined as "a body, by whatever name called, incorporated by federal law for the purposes of the Federal Government". UUM has been created by a federal law in the form of Act 30 thus making it a statutory body.

[13] The Federal Court case of *Fadzil Mohamed Noor v. Universiti Teknologi Malaysia* [1981] CLJ 85; [1981] CLJ (Rep) 53 was cited as an authority that a university incorporated under Act 30 is a body corporate. It is however not authority that a body corporate cannot be a statutory body as well.

[14] Act 605 came into force on 1 November 2000. All matters on discipline of officers of federal statutory bodies including that of UUM were to be in accordance with this law. Section 16A of Act 30 which vested in UUM Board of Directors disciplinary authority over its officers was deleted from 1 February 2009. The clear words in s. 28 makes it very clear that the incorporating law of the statutory bodies relating to discipline shall cease to apply. Section 28 states as follows:

28. Cessation of application of certain provisions of incorporating law

Upon the commencement of this Act the provisions which relate to discipline ... in the incorporating law of a statutory body and all subsidiary legislation made under or pursuant to those provisions shall cease to apply to that statutory body except as provided in section 29.

[15] Section 29 deals with saving and transitional provisions. Hence with the commencement of Act 605 on 1 November 2000, s. 16A of Act 30 was to cease to apply. To construe otherwise would run counter to the language of s. 28 that the provisions on discipline of incorporating laws of statutory bodies shall cease to apply upon the commencement of Act 605. It would also defeat the intention of Parliament "to bring about uniformity of law and procedure in matters relating to the discipline of ... officers of federal statutory bodies" as stated in the explanatory statement to the bill.

UUM's disciplinary proceedings against D1 pursuant to Act 605 were thus in order.

Was The Dismissal Valid

[16] The two charges against D1 were failure to sign the Aku Janji and to report for duty upon expiry of her study leave on 1 June 2003. On both counts a letter to show cause dated 17 March 2004 was issued to which D1 responded by letter dated 5 September 2004.

Failure To Sign Aku Janji

[17] By letters dated 10 August 2002, 27 October 2002 and 18 December 2002 D1 was asked to sign the Aku Janji. This was followed by the show cause and D1's response seeking clarification and giving her reasons for not signing. Although this came so much later and only then in response to the show cause, I agree there has been procedural impropriety by the Disciplinary Committee in not considering the factors below:

(i) failure of Head of Department (the Vice Chancellor) to explain the contents of the Aku Janji as required by para. 9 of Pekeliling Perkhidmatan Bilangan 17 Tahun 2001 – Penguatkuasaan Surat Aku Janji Untuk Pegawai Awam. It is

not sufficient for plaintiff Witness 1 (PW1–Dato Latifah bt Hj Hassan, Registrar of UUM at the material time) to deny that the Head of Department had not given such an explanation; and

(ii) failure to comply with reg. 4(1) of the Statutory Bodies (Discipline and Surcharge) Regulations (the Regulations) which requires any member of the Disciplinary Committee to declare his interest in the disciplinary proceedings. The Vice Chancellor was a member of the Disciplinary Committee and since the matter involved the Aku Janji of which he was required to explain the contents he should have declared his interest.

Absence

[18] Regulation 22 states that "absence" includes a failure to be present for any length of time at a time and place where the officer is required to be present for the performance of his duties. Regulation 23 goes on to state absence from duty without leave or without prior permission without reasonable cause shall render an officer liable to disciplinary action.

[19] On 31 October 2003 UUM had instructed D1 to report for duty immediately as her leave had ended on 1 June 2003. The fact of the matter remains that from 1 June 2003 to 31 October 2003 and then through to 5 September 2004 D1 had been absent without leave and without prior permission for a good one year three months. This constitutes absence without leave rendering D1 liable to disciplinary action and the consequences that entail.

[20] On this charge there was no procedural impropriety to speak of although D1 attacked it by questioning why UUM chose to take disciplinary action instead of terminating the contract and suing for breach. It was further submitted that by bringing disciplinary action UUM had acknowledged there was no breach of contract. I find there to be no such acknowledgment as these are two separate matters.

Finding On Validity Of Dismissal

[21] The procedural impropriety was in respect of the charge on Aku Janji and not absence without leave. That being the case and as the disciplinary proceedings were conducted in accordance with the relevant law which is Act 605, the dismissal of D1 on the charge of absence without leave can still stand.

Breach Of Contract

[22] Clause 1 of the agreement entered into between UUM and D1 required D1 to return to Malaysia immediately upon completion of her studies (para. c) to serve UUM (para. e). D1 completed her PhD studies in May 2003. This was followed by UUM's letter to her dated 31 October 2003 to report for duty immediately which was not heeded. Although D1 did subsequently request for an extension on 5 September 2004 she had chose to disregard the terms of the agreement in not returning to serve UUM from May 2003 till October 2003 and through to September 2004. In so doing, D1 had breached the agreement.

Damages

[23] Arising from the breach of the agreement, cl. 8(iii) provides if D1 is dilucutkan jawatannya dalam perkhidmatan, D1 is to:

> ... membayar balik kepada Universiti apabila sahaja wang tunai seperti dalam jadual di dalam Lampiran 1 atau semua wang yang telah dibayar kepada Pegawai atau bagi pihaknya secara gaji, elaun-elaun dan semua wang yang telah dibelanjakan untuk dirinya atau tanggungannya termasuk yuran pengajian, tambang dan pembiayaan lain mengikut mana yang terbanyaknya ...

[24] Plaintiff witness 3 (PW3 – Che Norain bte Ahmad, Principal Senior Assistant Treasurer UUM) prepared P19 which was the amount spent on D1 for her PhD and which formed the basis of UUM's claim.

[25] In cross examination, she said she didn't know the claim that could be made against D1 for breach of contract, P19 was prepared without reference to the agreement and she was not certain as to the amount UUM could claim. She disagreed that P19 was not in relation to a breach of contract or that the maximum UUM could claim was RM160,000. It was also her evidence UUM could claim for the salary paid thus far.

[26] In re examination, PW3 said P19 showed the amount spent on D1 and that was the amount claimed. The amount shown in the Lampiran was a general figure and not the overall amount.

[27] The essence of PW3 evidence shows P19 to be the amount expended on D1 for her PhD and the amount of RM160,000 to be a general figure. This is consistent with cl. 8 of the agreement.

As between the amount of RM502,917.06 which was expended and the amount of RM160,000 as stated in the Lampiran, the agreement provides for UUM to claim the larger amount which is precisely what it did. What UUM did was allowed for under the agreement.

Conclusion

[28] Based on the reasons as given above, plaintiff's claim is allowed and D1's counterclaim is dismissed. Costs to plaintiff. Counsel for both parties have agreed that the decision of this case binds case GS 22-350-2007.